No. 11,772

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN BRAITO,

Appellant,

vs.

GROVER C. KLEIN, Rear Admiral, United States Navy, Commandant Mare Island Navy Yard, JAMES V. FORRESTAL, Secretary of the Navy,

Appellees.

APPELLANT'S OPENING BRIEF.

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PRELIMINARY STATEMENT.

This case is a companion case to one already pending before this Court: *Daggs v. Klein, Etc., et al.,* No. 11581. In these cases, as well as in at least one other case now pending in the District Court for the Northern District of California, Southern Division (*Newton v. Klein, Etc., et al.,* No. 25929-R), the facts are substantially the same. Each case involves the discharge of a federal civil service employee presumably pursuant to the provisions of Public Law 671, 76th Congress (50 U.S.C.A. App. 1156), hereinafter quoted, and the claim by the discharged employee that the federal officer charged with the statutory duty of

"fully" informing him of the reasons for his discharge failed so to do thereby depriving said employee of his constitutional and statutory rights to his damage in excess of $3000.

In the cases now before this Court, two different District Court judges granted motions to dismiss. However, the dismissals were placed upon differing grounds: Judge St. Sure in the *Daggs* case holding that no federal question had been presented, and Judge Goodman in this case holding that the Secretary of the Navy was an indispensable party and the suit had to be dismissed for lack of jurisdiction over that officer.

The appellees urged a variety of grounds in support of their motions to dismiss in each of the two cases below, including those relied upon by each of the two District Court judges. We think it is significant that the two judges themselves were not able to agree on the precise ground for the granting of the motions. This indicates at least that there is some lack of clarity in the thinking on the problems posed by these cases and that a careful review of the District Court rulings is in order.

Since we have already filed an opening brief in the *Daggs* case, we believe it is not necessary to repeat all of the arguments therein contained, and with this Court's permission we should like to incorporate herein by reference so much of that brief as is germane to the instant appeal. Since Judge Goodman decided the instant case upon the ground that the Secretary of the Navy was an indispensable party,

we shall in this brief direct our principal attention to the problem posed by that ruling.

JURISDICTION.

The jurisdiction of the District Court to entertain this action is conferred by Section 24, amended, of the Judicial Code. (28 U.S.C. 41.) The jurisdiction of the Circuit Court of Appeals to review the District Court's final order dismissing the action for lack of jurisdiction over the Secretary of Navy, an alleged indispensable party, is conferred by Section 128, amended, of the Judicial Code. (28 U.S.C. 225.)

STATUTES INVOLVED.

Section 6 of Title 1 of Chapter 440 of the Act of June 28, 1940 (54 Stat. 679) as amended on August 21, 1941, by Chapter 385 (55 Stat. 654), so far as is relevant to this proceeding, provides:

> "That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; 5 U.S.C. § 652), shall not apply to any civil-service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the

authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated, shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal: And provided further, That within thirty days after such removal any such person shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he may desire to show why he should be retained and not removed." (50 U.S.C. App. 1156.)

Section 6 of the Act referred to in the foregoing excerpt reads in part as follows:

"No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; * * *" (5 U.S.C. 652.)

QUESTIONS PRESENTED.

1. Whether the Court below erred in granting appellees' motion to dismiss.

2. Whether the Court below erred in entering its order dismissing the action.

3. Whether the Court below erred in determining that the Secretary of the Navy is an indispensable party to this action.

4. Whether the Court below erred in determining that the first amended complaint does not state a cause of extra-official action without legislative sanction.

THE PLEADINGS.

The action was instituted by the filing of a complaint on May 6, 1946. (T.R. 2-13.)[1] Thereafter, and before any pleadings were filed by appellees, appellant filed a first amended complaint on January 30, 1947. (T.R. 13-24.) The gravamen of the complaint is that appellant, a Federal Civil Service employee at the Mare Island Navy Yard, was discharged from his employment there by the appellees and their predecessors in office, officers of the United States government, in violation of his rights under the Constitution of the United States and of his rights under the provisions of the above-quoted Act of Congress of June 28, 1940; the violation is alleged to have occurred in that within thirty days after his removal, appellant was not "fully informed of the reasons for such removal,"[2] and consequently not given an oppor-

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[1]References to the Transcript of Record will be cited herein as T.R.

[2]The complaint set forth the *verbal* statement given to appellant in connection with his discharge:

"Since September, 1939, the United States of America has been under a condition of emergency which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy

tunity to submit "such statement or affidavits, or both, as he (might) desire to show why he should be retained and not removed." The amended complaint contains substantially the same allegations but points up a little more sharply the constitutional provisions which appellant alleges were violated.[3]

On June 23, 1947, the appellees filed their motion to dismiss the action upon the grounds that the Court

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in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there should be not the least concern on the part of their associates or their administrative officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.

"Despite the constitutional rights of individuals as to freedom of speech and political opinion, these rights are not directly concerned in the right to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.

"Mr. Braito, your discharge was warranted by the demands of national security and was made from this Navy Yard because *a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States.* You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing." (T.R. 5-6, 16-17.)

Appellant contends that this vague and indefinite statement does not meet the requirement of the statute.

[3]Paragraph XIII of the First Amended Complaint alleged:

"That the action of the defendants in removing the plaintiff from his employment, as aforesaid, was, and is, a violation of the rights guaranteed to the plaintiff by the first and fifth amendments to the Constitution of the United States, in that said action abridged plaintiff's freedom of speech, of the press, and his right, peaceably, to assemble, and in that said action deprived plaintiff of his property without due process of law." (T.R. 22-23.)

lacked jurisdiction over the person of the appellee Forrestal, that the Court lacked jurisdiction over the subject matter of the complaint, that the suit was in effect one against the United States which had not consented to be sued, that the complaint failed to state a cause of action against the defendants on which relief could be granted, and that the suit might not be maintained in the absence of the appellee Forrestal who was asserted in the motion to be an indispensable party. (T.R. 25-26.)

THE OPINION OF THE DISTRICT COURT.

On August 5, 1947, the District Court issued its Order Granting Motion To Dismiss (T.R. 27), which reads in full as follows:

> "The action of the Secretary of the Navy, through the Commandant of the Mare Island Navy Yard, in discharging plaintiff from his civil-service position was taken pursuant to statutory authority (50 USCA App. Sec. 1156). Plaintiff's complaint states, at most, an alleged improper exercise of that authority in failing, after dismissal, to fully inform plaintiff of the reasons for his removal. It does not state a case of extra-official action without legislative sanction. Whether plaintiff alleges facts entitling him to reinstatement or to an opportnuity to be more fully informed of the reasons for his dismissal, the Secretary of the Navy in whom is vested the statutory power of dismissal and of reinstatement under 50 USCA App. Sec. 1156, is an indispensable party to the action. (Neher v.

Harwood, 128 F. 2d 846, [9th Cir.] Cert. Denied Oct. 12, 1942.)

"Ordered:

"Defendants' motion to dismiss is granted for lack of jurisdiction over the defendant, James V. Forrestal, Secretary of the Navy, an indispensable party to the action." (T.R. 27-28.)

ARGUMENT.

As appears from the above, the decision of the Court below seems to have been based upon only one of the grounds urged by the appellees in the motion to dismiss. In this argument, we shall consider the authority cited in the opinion of the Court below as the basis for its ruling that the Secretary of the Navy is an indispensable party and endeavor to establish that in this respect the Court below was in error and should be reversed. We shall then refer to the other propositions advanced by appellees in the motion to dismiss and by a reference to our opening brief in *Daggs v. Klein, Etc. et al.,* No. 11581 in this Court, endeavor to establish to the satisfaction of this Court that they are not well taken. We shall thereupon urge upon this Court a reversal of the order of the Court below with a clear expression of its opinion that not only is the Secretary of the Navy not an indispensable party to this action, but that the Court below does have jurisdiction in all respects as that question is raised by the motion to dismiss so that the matter may be remanded to the trial Court with instructions to proceed on the merits.

I.

THE SECRETARY OF THE NAVY IS NOT AN INDISPENSABLE PARTY TO THE ACTION.

The entire basis of the reasoning of the Court below, as far as can be ascertained from its order granting the motion to dismiss, is that the Secretary of the Navy is an indispensable party to the action. Applying the rule of this Court in *Naher v. Harwood,* 128 F. (2d) 846, the Court below felt impelled to enter its order of dismissal.

Insofar as *Naher v. Harwood* holds that an action must be dismissed in the absence of service upon or jurisdiction over an indispensable party defendant, we do not quarrel with the rule. Insofar, however, as the case is cited for the proposition that on the facts of the instant case the Secretary of the Navy is an indispensable party, we submit that it has been misconstrued and misapplied. We think that a careful analysis of *Naher v. Harwood* will establish that this is so.

That case, as appears from the very opening sentence of the Court's opinion (128 F. [2d] 846), was an action to enjoin a local post master from carrying into effect a fraud order issued by the Post Master General pursuant to a federal statute. Here we pause to point out that in the case now before the Court there is no effort to enjoin a subordinate officer from carrying into effect any order issued by a superior officer. The very nature of the two causes is markedly different.

In the *Naher* case the appellant (the complainant below) sought by the action to have the fraud order declared void for the reasons that the facts did not show any violation of the statute and that the statute was unconstitutional. In our case there is no effort to have any order of a superior officer declared void, nor is there a complaint that the statute *as written* is unconstitutional. On the contrary, it is our contention that *the subordinate officer failed properly to comply with the terms of the statute and in effect the subordinate officer has himself violated the statute.* By so doing *he* (*the subordinate officer*) has invaded appellant's constitutional rights. If *he* (*the subordinate officer*) had conformed with the statutory requirement of "fully informing" appellant of the nature of the charges against him, appellant then would have no complaint with respect to the action of the subordinate officer.

In the *Naher* case this Court made a rather extensive analysis of the problem of indispensable parties and determined that where a superior federal officer has acted under a statute which is not attacked as unconstitutional but where it is alleged *that the superior officer* has abused his discretion, *such* an officer must be made a party to an action against a subordinate; but that, on the other hand, where the superior officer is without authority to act at all, his attempt to authorize action by a subordinate is of no validity and the subordinate may be restrained without joining the superior officer.

With this rule we can have no quarrel. However, *the facts of the instant case do not fit into the rule.* It will be noted that the Court required the joinder of the superior officer in the *Naher* case when two conditions existed:

1. The statute is not attacked as unconstitutional; and

2. The superior officer has abused his discretion.

In our case the first condition is (or may under some circumstances be) met, but the second condition is not involved at all. It is not contended by appellant that the Secretary of the Navy abused his discretion in ordering the discharge of appellant, for in that respect he was acting within the scope of his statutory authority. However, it is contended that *the subordinate officer,* to-wit, Admiral Friedell, predecessor of the appellee Klein, *abused his discretion* by failing fully to inform appellant of the nature of the charges against him.

In other words, what the statute involved in this case does is to split the responsibility between the superior and the subordinate officer. The superior officer has the authority to discharge and to reinstate. However, since the employee is given the right to submit in written form reasons to justify his reinstatement or retention, and since he is given an opportunity personally to appear before "the official designated by the secretary concerned and be fully informed of the reasons for such removal," so that he may file the necessary documents which will meet those charges, the responsibility is placed upon "the official designated

by the secretary concerned" to make the full disclosure required by the statute. *It is not placed upon the secretary.* If the subordinate officer abuses his discretion and fails to comply with the statute, then that officer (the *subordinate,* not the Secretary) has deprived the employee of information which Congress said that that officer was to give to the employee in order to permit the employee to submit within thirty days statements or affidavits to show why he should be retained and not removed. In such a case the employee's complaint must of necessity be directed against the subordinate and the relief requested must run against the subordinate. At this stage of the statutory proceedings, nothing is required to be done by the Secretary, the entire responsibility for "fully informing" the employee is placed by the statute upon the subordinate officer.

An analysis of the statutes involved in the cases cited by this Court in support of its conclusion in the *Naher* case will show the correctness of this view. In each of those cases the *statute* required that the act around which the litigation centered be done by the *superior* officer himself, not by any subordinate officer. Thus, while in *Warner Valley Stock Co. v. Smith,* 165 U. S. 28, the Supreme Court recognized that the purpose of the action was to "control the action of the Secretary of the Interior" and that "the principal relief sought was against him, and the relief asked the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the order of his official head", yet basic to the

Court's conclusion was the fact that the statute involved provided that it should be the duty of the *Secretary of the Interior* to make out certain lists and plats of land and to cause a patent to be issued to the states in which they were situated under certain conditions. His subordinates were merely carrying our departmental instructions in connection with the designations made by *the Secretary of the Interior himself.*

In the case now before the Court, the statute is clear that "the official designated by the Secretary concerned" shall take certain action, not the secretary himself. It is the action or the lack of action of the official so designated and not of the secretary which gives rise to the complaint herein.

So in *Gnerich v. Rutter,* 265 U. S. 388, an action was brought against a local prohibition director to enjoin him from giving effect to a restriction contained in plaintiff's permit to sell intoxicating liquor. The permit had been issued by a subordinate officer pursuant to certain general regulations promulgated by the Commissioner of Internal Revenue. In holding that the Commissioner was an indispensable party, the Court pointed out that *the statute specifically provided that the Commissioner* should have authority to issue permits and to prescribe the form thereof.

Similarly, in *Webster v. Fall,* 266 U. S. 507, *the statute involved required the Secretary of the Interior* to cause funds to be paid to members of certain Indian tribes. The failure to join the Secretary was

held by the Court to be fatal. In addition to the statutory mandate which placed the responsibility for the action directly upon the shoulders of the Secretary of the Interior, the pleadings in that case, as summarized by the Court, indicate that the plaintiff himself recognized that the Secretary was the party against whom he should complain for he apparently alleged that the orders, rules and regulations issued under the statute by the *Secretary of the Interior* were unconstitutional.

It is seen from these cases and from the reasoning of this Court in the *Naher* case that the superior officer is an indispensable party *when he is the officer charged by Congress with the commission of certain acts.* However, the statute in the case now before the Court clearly does not charge the Secretary of the Navy with the responsibility for fully informing discharged employees of the reason for their discharge, but rather places that responsibility upon an official to be designated by the Secretary of the Navy. The Secretary of the Navy's statutory duty in this respect terminates when he so designates the official. Then the responsibility is squarely upon the shoulders of the official so designated. The failure of that official to comply with the statutory mandate gives rise to a cause of action against him, and the Secretary of the Navy can hardly be regarded as an indispensable party in such a cause of action.

In support of the statutory construction we here urge, we should like to direct the Court's attention to one other consideration. The rule that a cabinet officer is an indispensable party to a proceeding by a

citizen for redress is of course a fairly harsh one. It, coupled with the rule that the official residence of cabinet officers is in the nation's capital and that jurisdiction over them can only be obtained in Courts at that place, makes it necessary for a citizen aggrieved by federal action to travel to the nation's capital and institute his suit there. Certainly such a harsh rule should only be applied wherever it is absolutely required. It is not consistent with our concepts of governmental responsibility to private citizens to permit the defeat of such claims upon the technical grounds of failure to obtain jurisdiction over cabinet officers.

We have indicated above, of course, that as we see it the statute now before the Court for consideration does not make the Secretary of the Navy an indispensable party. We simply urge this additional argument as one which would justify the statutory construction urged by us in the event that the Court should entertain any doubt about the proper meaning of the statutory language.

In this connection we should like to repeat what we said in our brief in the *Daggs* case concerning the matter of jurisdiction over the Secretary of the Navy. The facts as set forth in these complaints disclose a shocking and outrageous disregard of the rights of American citizens and a violation by the Commandant of the Navy Yard and predecessor of defendant Klein of the Act of June 28, 1940, expressly providing that civil service employees discharged pursuant to the provisions of that statute should be *fully informed* of

the reasons for the discharge. Appellant here, a federal employee with more than nineteen years permanent civil service status and belonging only to fraternal organizations and a trade union (T.R. 8, 19-20), was summarily discharged from the Navy Yard thereby losing all of his civil service rights including his right to accrued leave and pay. The only reason given appellant for his removal was a vague and indefinite statement (T.R. 5, 16-17) by the officer designated by the Secretary of the Navy to give him the full information required by the statute. No effort was made to serve complaint and summons upon the Secretary of the Navy as appellant was aware that that officer could not be sued in this district without his consent. In naming Secretary Forrestal as a defendant, appellant did so for the purpose of giving that officer an opportunity to appear before the Court and to attempt to defend the failure of his subordinate officer to comply with the provisions of the statute. The position taken by the United States Attorney on behalf of the Secretary of the Navy indicates that the Secretary of the Navy, at least, does not care to undertake such a defense.

In any event, as we have pointed out above, the Secretary not being an indispensable party, the suit may be dismissed as to him and a cause of action still remains against the subordinate federal officer.

II.

THE DISTRICT COURT HAD JURISDICTION OF THE ACTION.

In addition to the point made by the District Court that the suit had to be dismissed because there was no jurisdiction over the Secretary of the Navy, the government raised certain other points in its motion to dismiss. We urge upon this Court a reversal of the District Court not only on the precise point upon which its decision was rendered, but also an expression of this Court with respect to its views upon the other matters raised in the government's preliminary motion so that when the cause is remanded to the District Court it may proceed to trial on the merits. These points we have heretofore discussed in our brief in the *Daggs* case and at this point we will simply state our position and refer to the argument in our opening brief in the *Daggs* case.

A. There is no interference sought with the discretion of an executive officer for the statute permits of no discretion. (See Appellant's Opening Brief, *Daggs v. Klein, etc., et al.,* No. 11,581, pages 51-56.)

B. The amount claimed is not beyond the jurisdiction of the District Court. (*Ibid.,* pages 56-57.)

C. The suit is not against the United States. (*Ibid.,* pages 57-63.)

D. There is a federal question presented. (*Ibid.,* pages 6-46.)

CONCLUSION.

For the foregoing reasons we urge this Court to reverse the order of the District Court dismissing the within action for lack of jurisdiction over the Secretary of the Navy since it is clear that the Secretary of the Navy is not an indispensable party to the proceeding. We further urge this Court to remand the case to the District Court with instructions to that Court to proceed with the trial of the action on the merits so that the violation of appellant's statutory and constitutional rights may be corrected as speedily as possible.

Dated, San Francisco, California,
January 2, 1948.

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